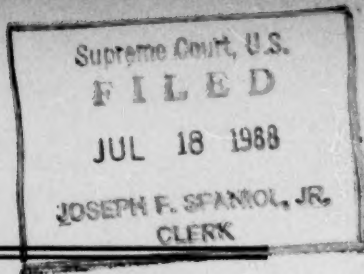


(2)

No. 87-1906



**In The
Supreme Court of the United States
October Term, 1987**

L. E. MORRISON and JEAN MORRISON,
Petitioners,

v.

COUNTY OF SAN DIEGO,
Respondent.

**On Petition for a Writ of Certiorari to the
California Supreme Court and the California
Court of Appeal, Fourth Appellate District**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is this petition barred by the doctrine of res judicata?

2. Is a property owner barred from challenging his stipulation in an eminent domain proceeding under California statutes where he has stipulated to a valuation date which is included in a final judgment?

3. Are the California state courts required to retroactively apply *Kirby Forest Industries, Inc. v. United States*, 467 US 1 [87 L.Ed.2d 1] 1984, in disregard of established legal principles concerning finality of judgments in state courts?

4. Where petitioner cites *Kirby Forest Industries, Inc. v. United States*, *supra*, as the basis for its petition for writ of certiorari and the statutory scheme involved in *Kirby* is dissimilar to the statutory scheme applicable to the instant case, and the *Kirby* case was decided not only after the petitioner's cause of action arose, but also after the issues presented in the petition had already reached final judgment, and where the case has been before the United States Supreme Court on an earlier petition for writ of certiorari in which the exact same issue and the exact same authority, i.e., *Kirby*, was presented and this Court refused certiorari; should the petition be once again denied, and a final end be put to the case?

5. Should the United States Supreme Court deny a petition for writ of certiorari involving a case whose facts are unique to it and in which any asserted inequity suffered by petitioner is due to petitioner's own delays?

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No. 87-1906

In The
Supreme Court of the United States
October Term, 1987

L. E. MORRISON and JEAN MORRISON,
Petitioners,

v.

COUNTY OF SAN DIEGO,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE CALIFORNIA SUPREME
COURT AND THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT**

Respondent County of San Diego respectfully opposes issuance of a writ of certiorari to review decisions of the California Supreme Court and California Court of Appeal, Fourth Appellate District, regarding a condemnation case that has already been before this Court in 1984 on petition for writ of certiorari and was finally litigated through every level of the California court system three times over the past fifteen years, it having been tried twice and having reached a third (supplemental) judg-

ment by stipulation and having been appealed three times, resulting in a final decision which is consistent with the United States and California Constitutions as well as statutory and case law.

OPINIONS BELOW

Included in the petition as appendices are the order of the California Supreme Court filed February 17, 1988, denying the Morrisons' petition for review (Appendix A to Petition) and the opinion of the California Court of Appeal, Fourth Appellate District, filed November 25, 1987 (Appendix B to Petition). Omitted by Petitioners are several prior court opinions and orders which respondent believes are necessary for a complete understanding of this case. They are, listed chronologically, the original San Diego County Superior Court Judgment in Condemnation entered on November 15, 1974 (Appendix 1, *infra*), and the accompanying Finding of Fact and Conclusions of Law also entered on November 15, 1974 (Appendix 2, *infra*); the opinion of the California Court of Appeal, Fourth Appellate District, filed April 18, 1977, reversing judgment and remanding the matter for a second trial (Appendix 3, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed December 24, 1980, denying Petitioners' petition for writ of mandate to stay Petitioners' displacement from their property (Appendix 4, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed July 1, 1981, denying Respondent's petition for writ of mandate and/or prohibition challenging the trial court order allowing Petitioners to amend their answer to include compensation for

loss of goodwill (Appendix 5, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed August 10, 1981, denying without prejudice Respondent's second petition for writ of mandate and/or prohibition on the same grounds as above (Appendix 6, *infra*); the Judgment in Condemnation of the San Diego County Superior Court entered December 16, 1981 (Appendix 7, *infra*); the opinion of the California Court of Appeal, Fourth Appellate District, filed March 19, 1984 (Appendix 8, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed April 17, 1984, entitled "Order Modifying Opinion" (Appendix 9, *infra*); the order of the California Supreme Court issued June 21, 1984, denying Petitioners' petition for hearing (Appendix 10, *infra*); Brief in Opposition No. 84-454 in lieu of the United States Supreme Court order denying Petitioners' previous petition for writ of certiorari, issued November 26, 1984 (Appendix 11, *infra*); the San Diego County Superior Court order filed September 20, 1985, denying Petitioners' Motion For Relief from Judgment (pursuant to California Code Civ. Proc., § 473) (Appendix 12, *infra*); the San Diego County Superior Court order filed January 7, 1986, denying Petitioners' Motion for Relief from Judgment (pursuant to California Code Civ. Proc., § 128, subd. (a)(8)) (Appendix 13, *infra*); the San Diego County Superior Court order filed March 28, 1986 denying Petitioners' Motion in Limine (Appendix 14, *infra*); and the San Diego County Superior Court's Supplemental Judgment on Remand filed June 11, 1986 (Appendix 15, *infra*). The above additions to the opinions and orders referenced by Petitioners constitutes a more definite and complete disclosure of the lower courts' opin-

ions and orders in this case as required by Rule 21(k)(ii) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

This case arises from condemnation proceedings initiated in 1973 by the County of San Diego (hereinafter "County") to acquire 69.17 acres of land owned by L. E. Morrison and Jean Morrison (hereinafter "Petitioners") for the purpose of developing Sweetwater Park. The action was commenced on February 16, 1973 by County upon filing its Complaint in Eminent Domain and issuance of Summons. Petitioners answered said complaint on July 2, 1973. After depositing a security deposit with the Clerk of the Court, County obtained an Order for Possession for a portion of the property on August 24, 1973, which took effect on September 13, 1973. On October 29, 1975 Petitioners obtained a court order authorizing withdrawal of the security deposit held by the court.

The case was first tried in Superior Court in 1974, the trial of which lasted approximately five months. Judgment was entered on November 15, 1974, the court specifically finding the date of value to be February 16, 1973. Said judgment awarded the Morrisons \$837,000.00 for the real property and \$61,630.00 for the equipment and fixtures. The County appealed the 1974 decision on the grounds that it was error to admit evidence of net profits derived from a hypothetical business in determining fair market value of the real property. The Court of Appeal agreed with the County holding that said trial evidence

was "clearly prejudicial" and reversed the Superior Court judgment. The 1973 date of value was not an issue at the 1974 trial or appeal thereof. The remittitur was entered on April 18, 1977. The retrial of this matter was originally set for July 26, 1978.

On the first scheduled trial date, July 26, 1978, Petitioners' first retained counsel, Donald McLean, requested a continuance of the trial date to complete an appraisal to allow Petitioners an opportunity to propose a settlement. The trial was continued for this purpose; however, subsequent discussions with Petitioners did not prove fruitful. At the continued trial date of February 22, 1979, Petitioners again requested a continuance on the grounds that their appraisal was still not complete. The requested continuance was granted to May 9, 1979. At the trial date of May 9, 1979, Petitioners requested another continuance to October 11, 1979, and represented to the court that they would be ready for trial and would request no more continuances. The continuance was granted.

Just prior to the scheduled trial date of October 11, 1979, Petitioners discharged counsel Donald McLean and engaged Ronald Endeman as new counsel. Mr. Endeman then requested a fourth continuance of the trial claiming that no appraisal had yet been done and the matter was continued to March 5, 1980. When the matter was called for trial on March 5, 1980, counsel for County was engaged in another and the matter trailed until April 30, 1980, at which time Petitioners requested a further continuance, stating that they were not yet ready for trial and that the appraisal had not yet been completed. County objected to any further continuances; however, the court granted a continuance to September 22, 1980 and suggested that

County take possession of the property. Mr. Endeman stated that Petitioners had no objection to County taking possession and further represented to the court that he would be ready for trial at the new trial date, September 22, 1980, and would request no further continuances.

A Stipulation and Order Continuing Trial signed by Mr. Endeman on behalf of Petitioners and by counsel for County and approved by the court, filed on May 20, 1980, reset the trial for September 22, 1980. Said stipulation recites that the continuance was requested by Petitioners in order to prepare for trial; it was the fifth continuance requested by Petitioners and the continuance of trial had no effect on the date of value in this proceeding "which is February 16, 1973," as expressly stated in the stipulation. County then deposited the necessary security funds with the court and obtained an Order for Possession on May 9, 1980 for the remainder of Petitioners' property and took possession of the property on August 13, 1980, at which time Petitioners' business was relocated to another site. Petitioners withdrew the funds on deposit with the court on May 16, 1980.

Just prior to the September 22, 1980 trial date, Petitioners discharged their second counsel, Mr. Endeman, and engaged present counsel, Louis Goebel. On September 22, 1980, Petitioners moved for another continuance of the trial and County objected; however, the court continued the trial until January 19, 1981, on the grounds that there was a new counsel in the case and still no appraisal had been completed. On January 19, 1981, the court again continued the trial to March 26, 1981; County was ready for trial and objected to the continuance. However, on the scheduled trial date of January 19, 1981, there were no

courts available and Louis Goebel, counsel for Petitioners, had an out-of-town trial beginning January 26, 1981, and the earliest date the court could schedule a trial continuance was for March 26, 1981. On March 26, 1981, trial was again postponed until September 29, 1981. The County was ready for trial and objected to the continuance. The reason for this continuance was that Louis Goebel was engaged in trial through the month of May. The court did not have any available trial dates after May until September 18, 1981. The presiding judge stated at that time that he would grant no more continuances and the case would be sent out to trial on September 29, 1981. Due to court congestion, the retrial in this matter eventually commenced on October 5, 1981. As a result of the above, the retrial of this matter was continued *eight* times, all at Petitioners' request, delaying the trial over three years.

At the commencement of the retrial, on October 5, 1981, prior to selection of the jury, Petitioners raised the issue regarding the applicable date of value before the trial judge. Petitioners urged that a May 9, 1980 date of value be used rather than the previously established date of February 16, 1973. Petitioners did not raise any federal constitutional issue before the trial judge on this matter but, instead, relied upon a recently enacted state statute. However, the statute expressly stated: "This article does not apply to an eminent domain proceeding commenced prior to January 1, 1976. . . ." The present eminent domain case was commenced on February 16, 1973 and the trial judge held that "this statutory language is crystal clear," and upheld the February 16, 1973 date of value.

A stipulation setting the value of fixtures and equipment at the sum of \$69,505.00 had been previously filed on

May 19, 1981, and the jury awarded \$875,000.00 as the fair market value of the real property and \$56,250.00 as compensable loss of good will. The Judgment in Condemnation setting forth the above award together with seven percent interest was entered on December 16, 1981. No objections to the judgment were filed by Petitioners.

County filed a notice of appeal on February 11, 1982 as to the award for loss of good will, and Petitioners filed a notice of cross-appeal on March 5, 1982 as to the judgment in condemnation and the court's order denying recovery of litigation expenses.

The Court of Appeal favored the County's appeal and reversed the trial court judgment, striking the loss of good will award. The Court of Appeal disfavored Petitioners' cross-appeal and affirmed the trial court's date of value of 1973. It also affirmed the denial of Petitioners' motion for litigation expenses. The Court of Appeal did, however, reverse the seven percent prejudgment interest award and remanded the matter back to the trial court for the limited purpose of determining the market rate of interest.

Petitioners filed a petition for hearing with the California Supreme Court. It was denied on June 21, 1984. Petitioners then filed a petition for writ of certiorari (No. 84-454) with the United States Supreme Court. The sole issue raised therein was the February 16, 1973 date of value in light of the recent United States Supreme Court opinion in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 [87 L.Ed.2d 1] (1984). Petition was denied on November 26, 1984.

With the case once again before the San Diego Superior Court, this time on remand limited to the determination of the applicable market rate of interest payable on the condemnation award, Petitioners filed a motion for relief from judgment pursuant to California Code of Civil Procedure section 473 challenging the February 16, 1973 date of value established in the 1981 judgment and upheld on appeal. Motion was denied on September 20, 1985. Petitioners then filed a motion for relief from judgment pursuant to Code of Civil Procedure section 128, subdivision (a)(8), once again challenging the February 16, 1973 date of value. Motion was denied on January 7, 1986. Petitioners next filed a motion in limine to change the date of value; it was denied on March 28, 1986. Thereafter, on June 11, 1986, pursuant to stipulation by the parties as to applicable rate of interest, the San Diego County Superior Court filed a Supplemental Judgment on Remand.

Petitioners once again appealed the case to the California Court of Appeal, Fourth Appellate District. Petitioners challenged the trial court's refusal at the hearing on remand to admit evidence of the change in value of Petitioners' property after the original valuation date, February 16, 1973. The trial court had ruled that the remand from the Court of Appeal required only a determination of the applicable rate of interest payable on the condemnation award, the judgment fixing the amount of the award based on the February 16, 1973 date of value being final. The Court of Appeal affirmed.

Petitioners sought review in the California Supreme Court. Their petition for review was denied February

17, 1988. Petitioners now petition this Court a second time for a writ of certiorari.

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SUMMARY OF ARGUMENT

What commenced as a routine condemnation case in 1973 has been through three appeals in the state court system and is now before this Court on a *second* petition for writ of certiorari. This petition presents the very same issue (the February 16, 1973 date of valuation) as was presented in the first petition which has before this Court in the 1984 term. The prior petition was denied.

This case was tried and appealed in 1974. Retrial, which was set for July 1978, was delayed over three years due to Petitioners' dilatory tactics. Petitioner obtained eight continuances and discharged counsel on the eve of trial on two occasions.

Petitioners' sole basis for seeking writ of certiorari is the *Kirby* case (*supra*). That case was decided eleven years after this condemnation cause of action arose. Had it not been for Petitioners' insufferable delays, this case would have long since been final, with the time for appeal/petition to this Court having expired well before *Kirby* was ever decided.

The *Kirby* case is clearly distinguishable on the facts. The Court of Appeal carefully considered *Kirby* and found it inapplicable. Not only did the California condemnation statute dictate the 1973 date of valuation, but

the trial court made a finding to that effect, the parties also so stipulated upon retrial, and the date has been upheld on appeal.

When the case was before the trial court the third and last time on limited remand (for the sole purpose of determining the applicable market rate of interest), the court was without jurisdiction as to the date of valuation as that issue had become final and was the law of the case.

Any alleged inequity suffered by Petitioners is directly attributable to Petitioners' own conduct. Petitioners received due process.

This is not a case deserving of the attention of this Court. There are no important questions of law presented herein and no conflict between the California courts' holdings and the decision of this Court in *Kirby* or any other case. The facts of this case are unique. The "issue" presented herein is not likely to ever present itself again. The statute which was the basis of the condemnation action herein has been repealed and the current statute requires a money deposit by government upon commencement of condemnation proceedings and the situation is not going to recur. This Court should put an end to this frivolous and costly litigation. It should deny certiorari.

ARGUMENT**I****THE DECISION BELOW IS CONSISTENT WITH BOTH CALIFORNIA STATUTORY AND CASE LAW ON EMINENT DOMAIN AND FEDERAL CONSTITUTIONAL PRINCIPLES OF DUE PROCESS****A. The Delay in Bringing this Matter to Retrial is Attributable to Petitioners And Any Alleged Inequity Results From Petitioners' Own Actions.**

This case is unique in that it has a lengthy history, the length of which was caused by Petitioners themselves, who persisted in continuing the retrial in this matter through *eight* consecutive requests for continuances, all of which were granted over County's opposition. Petitioners are incorrect in contending in their brief that this delay is a "red herring."

This action was commenced on February 16, 1973 when County filed its Complaint in Eminent Domain and the Summons was issued. The case was first tried in Superior Court in 1973, lasting approximately five months. Judgment was entered on November 15, 1974, the court specifically finding the date of value to be February 16, 1973. County appealed the 1974 decision on the grounds that it was an error to admit evidence of net profits derived from a hypothetical business in determining fair market value of the real property. The Court of Appeal agreed with County, holding that said trial evidence was "clearly prejudicial"; it reversed the Superior Court judgment. The 1973 date of value was not an issue at said 1974 trial or appeal thereof. The remittitur was entered on April 18, 1977.

The retrial of this matter was originally set for July 26, 1978; however, Petitioners obtained numerous continuances and changed counsel on three different occasions, all of which resulted in the retrial being delayed over three years. This delay was caused solely by Petitioners, as was detailed in the Superior Court proceedings based on the court record in this case. At the time of the fifth continuance, which was granted as were the four previous ones over the County's objections, the court suggested that County take possession of the property. Petitioners' then attorney, Ronald Endeman, stated that Petitioners would have no objection to County taking possession. He further represented to the court that he would be ready for trial at the new trial date, September 22, 1980, and would request no further continuances. A Stipulation and Order Continuing Trial, signed by Mr. Endeman on behalf of Petitioners and approved by the court, filed on May 20, 1980, reset the trial for September 22, 1980. This stipulation recited that the continuance was requested by Petitioners in order to prepare for trial and that the continuance of trial had no effect on the date of value in this proceeding "which is February 16, 1973." County then deposited the necessary security funds with the court and obtained an Order for Possession on May 9, 1980 for the remainder of Petitioners' property. County took possession of the property on August 13, 1980, at which time Petitioners business was relocated to another site. Petitioners withdrew the funds on deposit with the court on May 16, 1980.

Just prior to the September 22, 1980 trial date, Petitioners discharged their second counsel, Mr. Endeman, and

engaged present counsel, Louis Goebel. On September 22, 1980, Petitioners moved for another continuance of the trial and County objected; however, the court continued the trial until January 19, 1981, on the grounds that there was a new counsel in the case and still no appraisal had been completed. The trial date was again continued on January 19, 1981, and after several more continuances, the retrial in this matter eventually commenced on October 5, 1981. As a result of the above, the retrial of this matter was continued *eight* times, all at Petitioners' request.

Thus, this delay not a "red herring", as Petitioners contend. The facts clearly show that 1973 was the correct date, by stipulation and judicial decree, and upheld on appeal. To overturn the prior stipulation and judicial decisions now would be without legal or factual basis and would be clearly prejudicial to the County of San Diego which has relied on the stipulation and judicial decisions. Furthermore, to allow Petitioners to reap a benefit from their dilatory tactics would be clearly inequitable.

B. The Limited Remand on the Second Appeal Was Not A Basis to Modify the Final Judgment As to the Date of Value.

In *County of San Diego v. Morrison* (1983) 153 Cal. App.3d 233, the Court of Appeal not only held February 16, 1973 was the correct valuation date, it also modified the judgment to exclude the award for loss of business goodwill, held Petitioners were not entitled to recover litigation expenses, and affirmed the judgment as modified. However, the Court of Appeal reversed the award of seven percent interest on the amount of unpaid com-

pensation and remanded the case "for further proceedings to determine the applicable market rate of interest."

After this decision became final (following denial of petitions to the California Supreme Court and the United States Supreme Court), Petitioners filed a series of three motions in Superior Court, all seeking a *Kirby* evidentiary hearing as to value. All three motions were denied. As the Court of Appeal correctly found, its prior remand was only for the limited purpose of determining applicable market rate of interest and the trial court was without jurisdiction to entertain a *Kirby* motion for an evidentiary hearing. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655; *Rice v. Schmid* (1944) 25 Cal.2d 259, 263; *Skaggs v. City of Los Angeles* (1956) 138 Cal.App. 2d 269, 272; *Snoffer v. City of Los Angeles* (1936) 14 Cal.App.2d 650, 653.)

The Court of Appeal found that its inquiry was not so limited; it also properly found that *Kirby* was inapplicable to the case herein given that the judgment was final as to the *amount* of the award (the applicable rate of interest being the only subject of the limited remand).

C. The Kirby Case is Inapplicable to the Case Herein As There Was a Final Judgment As to the Award In the Condemnation Proceeding.

Petitioners rely solely upon the decision in *Kirby*, *supra*, to support their position that they are entitled to a new hearing on this issue and that they were not awarded "just compensation" when the 1973 date of value established at trial was used for the retrial of

the appeal. However, the *Kirby* case is not applicable in that it is clearly distinguishable from the present case. Furthermore, the same arguments regarding the applicability of the *Kirby* case were made by Petitioners in their prior petition to the United States Supreme Court for writ of certiorari which was denied. (See Appendix 11.)

Although all eminent domain actions must comply with the provisions of the Fifth Amendment to the United States Constitution (made applicable to California by the Fourteenth Amendment to the United States Constitution) in providing property owners "just compensation" for their land, the federal statutory condemnation scheme is quite different from that of the State of California. As described by the United States Supreme Court in the beginning of its *Kirby* opinion, there are three statutory methods of condemnation available to the United States. There is only one statutory method available in the State of California. Although the federal condemnation procedures and the California statutory procedure all provide "just compensation" to the property owner, each procedure has its own statutory provisions. The so-called "straight-condemnation procedure", involved in the *Kirby* case, allows the United States to wait until a condemnation award is entered and then the government has the option to purchase the property at the adjudicated price or dismiss the condemnation action.

The court emphasized the impact of this straight-condemnation procedure on its decision. Moreover, the court quoted *Danforth v. United States* (1939) 308 U.S. 284 [84 L.Ed. 240 at 246] as follows:

"Unless a taking has occurred previously in actuality or by a statutory provision, . . . we are of the

view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." (Emphasis added.)

The court does show deference to statutory provisions implementing condemnation procedures and, in particular, in establishing a date of taking or value. The California statutory scheme expressly established a date of taking in the present action as February 16, 1973 and this date has been upheld through the prior appeals. The judgment as to the amount of the award is final.

As the Court of Appeal noted, *Kirby* construed 40 United States Code section 257 and Federal Rule of Civil Procedure 71A and concluded title to property subject to condemnation proceedings, orders and procedures passes to the government upon tender of payment. The court went on to declare that, under the Fifth Amendment, the date of valuation did not control the amount the government had to pay if, at the date the government acquired title, the fair market value of the property substantially exceeded the value determined at the valuation date, there the date of trial. Instead, the procedure described by Rule 60(b) empowering a federal court to "amend a final order" for any reason justifying relief from the operation of the judgment should be followed and an evidentiary hearing held to determine differences, if any, between the valuations of the property. There are no comparable procedures under California law. Instead, the Court of Appeal correctly found insurmountable barriers to the relief now sought by the Morrisons in that the judgment affirming the award is long since final.

Petitioners contend that the award is not final because of the limited remand as to interest and they raise the specter of "multiple final judgments". This is incorrect as the amount of the condemnation *award* is long final—the amount of interest is never finally determined until the award is paid. This hardly means that the award itself is not final until interest on the award is calculated and it certainly does not result in multiple judgments.

Although Petitioners make (once again) an impassioned plea as to the allegedly important constitutional principles established by the United States Supreme Court in *Kirby*, and which Petitioners allege they are being deprived of, their argument simply misses the point. The Court of Appeal did not rule in this case as to any *prospective* effect *Kirby* may have on California eminent domain proceedings.¹ Rather, the Court of Appeal, simply and properly, based on the *unique* fourteen year history of this case found *Kirby* inapplicable concluding:

"While *Kirby* holds the Fifth Amendment requires compensation for a taking to be measured as of the date of the taking, where the date of valuation

¹Respondent contends that the *Kirby* decision would not be applicable to require a change in valuation date even if the court did not find *Kirby* inapplicable based on the finality of the judgment. Although it is not necessary to reach these arguments on this petition, respondent notes that there are various other reasons why *Kirby* is inapplicable in this case such as that the delay in bringing the matter to retrial was solely caused by Petitioners, the parties entered into a stipulation in 1980 establishing the date and because California statutory law establishing the date is not inconsistent with *Kirby* which applies to the federal statutory schemes.

approval results in a substantially lower value, *Kirby* dealt with a judgment not final, or, stated differently, a judgment subject to amendment under Federal Rule of Civil Procedure 60(b). Here, the judgment as to the amount of the award is final. In the circumstances presented, the judgment may not be modified or amended by the trial court to increase the amount of the award. (See 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, §§ 80-83, pp. 515-520.)

“We conclude the finality of the judgment as to the award under California law makes inapplicable *Kirby’s* Fifth Amendment concerns. Otherwise, judgments in eminent domain proceedings though filed and recorded would be subject to collateral attack. Respecting as we do pronouncements of the United States Supreme Court, we do not read *Kirby* as overruling long-established California law respecting finality of judgments.”

D. California Statutory Law and the Court of Appeal Established the Date of Taking in this Case as February 16, 1973.

The date of value in this eminent domain action is February 16, 1973 (the date the summons was issued), as provided for in former section 1249 of the California Code of Civil Procedure which was in effect at the time this proceeding was commenced. The trial court, in the original 1974 trial of this matter, specifically found the date of value to be February 16, 1973. And on May 20, 1980, this same date of February 16, 1973 was also stipulated as the date of value for purposes of retrial by Petitioners and was approved by the trial court. Accordingly, the trial court in the 1981 retrial of this matter ruled the date of value to be February 16, 1973. This date of value was affirmed by the appellate court in *County of San Diego v. Morrison, supra*. Petitions to both the California Supreme

Court and this Court to overturn the 1973 date of value have been denied.

The law applicable to this case is found in the provisions of the California Code of Civil Procedure in effect when the complaint was filed, i.e., former Code of Civil Procedure section 1237 and following. Pursuant to former Code of Civil Procedure section 1249, the date of value in the present case is the date of issuance of summons. Former section 1249 provides: "For purposes of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of issuance of summons."

Specifically addressing this issue, the California Supreme Court has held that in interpreting California Code of Civil Procedure section 1249, the date of issuance of summons remains the valuation date in the event of a retrial.

"[T]he correct interpretation of [section 1249] is that the date for fixing valuation and damages is determined at the time of the first trial and in the event of subsequent retrial or retrials, *once having become fixed, it remains the same.*" (Emphasis added.) (*People v. Murata* (1960) 55 Cal.2d 1.) (See also *City of Santa Maria v. Alco-Pacific Enterprises, Inc.* (1968) 266 Cal.App.2d 477; *People ex rel. Dept. of Pub. Wks. v. Shasta Pipe Etc. Co.* (1968) 264 Cal.App. 520; *People ex rel. Dept. of Pub. Wks. v. Mascotti* (1962) 206 Cal.App.2d 772.)

The date of value in this matter was determined at the time of the first trial as February 16, 1973, and therefore, "having become fixed," remains the same in the subsequent trial. The United States Supreme Court has held in both *Kirby, supra*, and *Danforth v. United States, supra*, that statutory provisions will prevail in determining a

date of taking. In the present case, the California statutory provisions are "crystal clear" that once a date of taking is established, it will remain the same in a subsequent retrial or retrials. This date has consistently been upheld on appeal. There is no basis in law, in fact, or in equity for this Court to overturn the final judgment as to date of valuation.

E. The Stipulation of the Parties in this Case Controls.

It is of further importance that the parties entered into a stipulation, approved by Superior Court on May 20, 1980, that the date of value in the retrial was to be February 16, 1973. The law is quite clear that when parties have stipulated to a particular date of value, that date controls. The use of a stipulation is an expeditious way of resolving valuation date problems. (*State of California ex rel. Dept. of Water Resources v. Clark* (1973) 33 Cal. App.3d 463, 468; *People v. Murata, supra*, at pp. 4-5.) Furthermore, the May 20, 1980 stipulation was executed after the effective date of the new Eminent Domain Law and it therefore evidences a clear agreement as to the February 16, 1973 date of value; an agreement that Petitioners now seek to breach. Petitioners apparently contend that this stipulation is not controlling under *Kirby*. However, in *Kirby*, the stipulation was entered into in 1979, three years *before* the purported "delay." In the case herein, the stipulation was entered into in 1980 and thus *after* the purported "delay" that Petitioners now be-
moan. The February 16, 1973 date of value must remain unchanged.

II

**RES JUDICATA AND THE LAW OF THE
CASE DEMAND THAT THIS CASE BE PUT
TO AN END****A. Petitioners' Action Herein is Barred by the
Doctrine of Res Judicata.**

A final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to subsequent action involving the same claim, demand or cause of action. (*Matchett v. Rose* 36 Ill. App.3d 638, 344 N.E.2d 770, 779.) A matter once judicially decided is finally decided. (*Massie v. Paul* 263 Ky. 183, 92 S.W. 2d 11, 14.)

With the sole exception of the determination of the applicable market rate of interest to be paid to Petitioners on their condemnation award, this case was final at the state court level when the California Supreme Court denied Petitioners' request for hearing on June 21, 1984. The issue of date of value was finally determined to be February 16, 1973.

This very issue, i.e., the date of value, was already challenged before this Court by Petitioners under case number 84-454 (*infra* at Appendix 11). This Court denied that petition on November 26, 1984. There can be no more final a judgment than one which has been before this Court. Res judicata precludes Petitioners from a second petition for certiorari on a matter which has already become a final judgment.

B. Petitioners' Action Herein is Barred by the Doctrine of Law of the Case.

The well-established doctrine of the "law of the case" controlled in the state trial and appellate courts and controls this Court as well. This doctrine provides that the decision of the appellate court conclusively establishes the law to be applied in any subsequent proceedings of the same case. A concise statement of the doctrine appears in *Tally v. Ganahl* (1970) 151 Cal. 418, 421. The doctrine of the law of the case requires courts to follow the principles laid down upon a former appeal in the same case, whether those principles are right or wrong. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 210-212; *Lindsey v. Meyer* (1981) 125 Cal.App.3d 536, 541.) All questions and issues adjudicated on a prior appeal are the law of the case upon all subsequent appeals and will not be reconsidered. (*Allen v. Cal. Mutual B. & L. Assn.* (1943) 22 Cal. 2d 474, 481.)

Thus, on remand, the trial court only had jurisdiction to consider the limited issue of interest which is all that was remanded to it by the appellate court. All other issues were final and could not be reconsidered either by the trial court or on appeal from its judgment on remand. As to all other matters, the doctrine of the law of the case makes the former decision conclusive. (*Lambert v. Bates* (1905) 148 Cal. 146.)

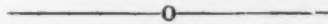
In the present case, Petitioners challenged the 1973 valuation date on the last appeal and the appellate court affirmed the 1973 date. (*County of San Diego v. Morrison, supra*, 153 Cal.App.3d 233.) The California Supreme Court denied a hearing on that issue. Petitioners were not en-

titled to a second retrial on the date of valuation and they are certainly not entitled to another appeal on that issue.

III

**SINCE THE RESULT BELOW IS EQUITABLE
AND THE CASE PRESENTS NO CONFLICT
OR IMPORTANT QUESTION OF LAW,
CERTIORARI SHOULD BE DENIED**

The Court of Appeal's decision is very limited and raises no important question of law which this Court must settle nor does the decision conflict with any other decision. The Court of Appeal's decision is firmly grounded in the unique, and lengthy, history of this case and is correctly decided based on these facts. This Court should now put an end to this litigation by denying this petition for review. Any perceived inequities which might otherwise be noteworthy were brought about solely by Petitioners' own incessant dilatory behavior in obstructing a timely retrial in this matter.



CONCLUSION

For the reasons set forth above, this attempt by Petitioners to seek relief from this Court, after this Court already denied certiorari when the same issue was before it previously, must be denied. This Court should put an end to this protracted litigation.

DATED: July 18, 1988

Respectfully submitted,

LLOYD M. HARMON, JR.,
County Counsel

/s/ Daniel J. Wallace
Daniel J. Wallace, Chief Deputy
Counsel for Respondent

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APPENDICES

APPENDIX 1

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San Diego, California 92101

AND

HIGGS, FLETCHER & MACK
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236-1551

By HAROLD E. LANDIS and JOE N. TURNER
Attorneys for Plaintiff and Cross-Defendant

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,)	
)	
Plaintiff,)	NO. 339813
v.)	
)	
L. E. MORRISON, et al.,)	
)	
Defendants.)	
)	JUDGMENT IN
)	CONDEMNATION
)	
L. E. MORRISON and JEAN)	
MORRISON,)	
)	
Cross-Complainants,)	
v.)	
)	

App. 2

COUNTY OF SAN DIEGO,)	(Filed November
DOES I through XX,)	15, 1974)
)	
Cross-Defendants.)	
)	
)	
)	

Upon the Findings of Fact and Conclusions of Law on file herein and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Upon payment into Court for the benefit of the defendants of the total sum of \$898,638, the property described in plaintiff's Complaint as Parcel No. 71-0083 A, B, C, D and E, together with all improvements thereon pertaining to the realty and the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law shall be condemned for the purposes set forth in the Complaint.

2. The payment into Court of the sum of money specified above is in full payment for the interests in the land so taken, together with all the improvements thereon pertaining to the realty, the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law, and for all damages of every kind and nature suffered by the defendant by reason of the taking of the property.

3. From said total sum of \$898,638, the following shall be disbursed to the County Tax Collector of San Diego County, pursuant to Section 4986, et seq. of the California Revenue & Taxation Code:

(1) Zero dollars, the total due as of the day before trial, April 16, 1974;

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(2) Zero dollars per day from April 17, 1974 (the date of trial) through June 30, 1974;

(3) \$17.72 per day from July 1, 1974 to and including the day before the date the Final Order of Condemnation in this proceeding shall be recorded.

4. All taxes, penalties and costs which are a lien on said Parcel and which are apportioned to that portion of the fiscal year from the date that the Final Order of Condemnation is recorded in the Office of the County Recorder of San Diego County are hereby cancelled pursuant to Section 4986 of the Revenue & Taxation Code.

5. Defendants shall recover costs of suit incurred herein in the sum of \$_____.

6. The cross-complaint filed by the defendants is dismissed with prejudice subject to the plaintiff's acquisition of the defendants' property by Final Order of Condemnation.

Dated: November 15, 1974

/s/ Gilbert Harelson
Judge of the Superior Court
GILBERT HARELSON

APPENDIX 2

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San Diego, California 92101

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By HAROLD E. LANDIS and JOE N. TURNER
Attorneys for Plaintiff and Cross-Defendant

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,)	
)	
Plaintiff,)	NO. 339813
v.)	
)	
L. E. MORRISON, et al.,)	
)	
Defendants.)	FINDINGS OF
)	FACT AND
)	CONCLUSIONS
)	OF LAW
_____)	
L. E. MORRISON and JEAN)	
MORRISON,)	
)	
Cross-Complainants,)	
v.)	
)	

App. 5

COUNTY OF SAN DIEGO,)	(Filed November
DOES I through XX,)	15, 1974)
)	
Cross-Defendants.)	
)	
<hr/>)

This action in eminent domain to condemn certain property of the defendant, hereinafter described, for public park purposes, came on for trial on April 17, 1974. The plaintiff is the County of San Diego, a political subdivision of the State of California. The defendants, L. E. and Jean Morrison, are the owners of the real property sought to be condemned by the plaintiff County of San Diego.

The plaintiff County of San Diego appeared by and through Robert G. Berrey, County Counsel, William George, Deputy County Counsel, and Harold E. Landis, Joe N. Turner, J. Tim Konold, and Higgs, Fletcher & Mack.

The defendants, L. E. Morrison, Jean Morrison, Bank of America National Trust & Savings Association, Hattie I. Brewer, a widow, beneficiary under Deed of Trust recorded March 7, 1968 as Document No. 38734 of Official Records and Vesta Gent, a married woman, beneficiary under deeds of trust recorded January 29, 1969 as Document No. 16727 and February 3, 1970 as Document No. 19358, Official Records, County of San Diego, appeared by and through Donald F. McLean, Jr., C. Michael Cowett, and Jennings, Engstrand & Henrikson, a Professional Law Corporation. All of the parties hereto having waived their right to a trial by jury, the case was tried before Hon.

Gilbert Harelson, Judge of the Superior Court, sitting without jury.

The trial commenced on April 17, 1974 and concluded on September 10, 1974, and the matter was submitted to the Court for decision. Prior to, during, and following the trial of the action, various legal memoranda were submitted by both parties and considered by the Court.

The parties presented evidence through witnesses, the submission of documents and exhibits, and a view of the condemned property.

Upon consideration of the pleadings on file herein, the evidence, both oral and documentary, submitted herein, the Court's view of the condemned property, the legal memoranda submitted by the parties, the oral argument presented by the parties, and good cause appearing therefor, the Court hereby makes and files the following:

FINDINGS OF FACT

1.

This proceeding in eminent domain was regularly commenced in San Diego County, California, on March 12, 1973 by the filing of a complaint in eminent domain by the plaintiff, the County of San Diego, a political subdivision of the State of California.

2.

The defendants, L. E. and Jean Morrison, are the owners of the property being condemned in this proceeding, as the same is more fully described in the complaint on file herein.

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3.

All of the defendants mentioned in the proceeding recitals have interests in the property which is the subject of this proceeding and which property is described in the complaint on file herein and is denominated therein as Parcel No. 71-0083 A, B, C, D and E.

4.

Said Parcel No. 71-0083 A, B, C, D and E is an entire parcel and there is no remainder parcel.

5.

The Superior Court of the State of California in and for the County of San Diego is a proper Court for the trial of this proceeding, and the Court has jurisdiction of the parties and of the subject matter of this action.

6.

The property owned by the defendants is being condemned for public park purposes.

7.

The plaintiff, County of San Diego, has the power to condemn all of the defendants' property.

8.

The use and purpose for which the plaintiff County of San Diego is condemning the defendants' property, to wit: a public park, is a public use and is a use authorized by law. The taking of the defendants' property, as described in the complaint, is necessary for said public use.

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The location of the proposed public improvement and project, which is the object of the action, is planned and located in a manner which will be most compatible with the greatest public good and the least private injury.

9.

The date upon which just compensation is to be ascertained is February 16, 1973.

10.

The plaintiff is condemning fixtures and equipment compensable in an action in eminent domain as follows:

- Plant, sand and gravel processing
- Blender
- Pumping system
- Scale, motor truck
- Steel hopper
- Centrifugal pump
- Portable rock crusher
- Steel tank (gasoline)
- Steel tank (Diesel oil)
- Steel shed
- Floating dredge, clam shell
- Engine/power plant, gasoline engine
- Rubber belts, misc., used; sand plant spare parts
- Trailer, 2-wheel office

11.

As of the valuation date for the subject parcel, the defendants possessed a right to extract sand from a six-acre site on the property and further possessed a permit

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from the County of San Diego to process sand extracted therefrom.

12.

As of the date of valuation, there was not a permit to extract sand from any other area of the subject property, nor was there a permit to process sand taken from any other area of the property. As of the valuation date, there was no application pending for a permit to extract or process sand for an expanded area within the subject property.

13.

The highest and best use of the property is interim sand extraction followed by private recreational use.

14.

There is a reasonable probability that a use permit will be issued by the County of San Diego for the expansion of the area of the existing sand extraction program for a ten-year period.

15.

There is a reasonable probability that a use permit will be issued by the County of San Diego for a private recreation park at the end of the said ten-year period.

16.

The market value of the land is the proper measure of just compensation in this case.

App. 10

17.

The market value of land containing sand must include, as a factor, the value of the sand in place.

18.

The value of sand in place is fixed by capitalizing the net income from its extraction and sale.

19.

The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing.

20.

The defendant has not met his burden of proof as to the residual land value of \$210,000, or any value thereof.

21.

The fair market value of the real property sought to be condemned is \$837,000.

22.

The fair market value of the fixtures and equipment enumerated in Finding No. 10, supra, is \$69,505.

23.

Pursuant to stipulation of the parties it has been agreed that the following items are to be withdrawn by defendants prior to possession by plaintiff at the indicated values:

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Scale, motor truck	\$2,995.00
Centrifugal pump	120.00
Portable rock crusher	3,000.00
Steel tank (gasoline)	135.00
Steel tank (Diesel oil)	400.00
Trailer, 2-wheel office	800.00
Steel shed	425.00

Thus, the total of the above-withdrawn items is \$7,875, and the just compensation for fixtures and equipment actually taken by plaintiff is \$61,630.

24.

The total just compensation to be paid to defendants is the market value of the real property, \$837,000, plus the net amount due for equipment and fixtures, \$61,630, for a total of \$898,630.

25.

Defendants and cross-complainants, L. E. Morrison and Jean Morrison, filed a cross-complaint in this action on July 2, 1973.

26.

There was no evidence presented upon the issues raised in the cross-complaint.

CONCLUSIONS OF LAW

1.

The plaintiff herein has the power to condemn the property of the defendants.

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2.

Pursuant to Section 4986, et seq. of the California Revenue and Taxation Code, the Court will order that taxes and penalties due and owing the County of San Diego shall be paid from the award.

3.

Upon the payment of damages awarded in the Final Judgment of Condemnation, the plaintiff will be entitled to a Final Order of Condemnation.

4.

The defendants are entitled to their costs of suit herein.

5.

The total just compensation is \$898,630.

6.

The income approach utilized by Dr. Edward J. Neuner in fixing the value of sand in place was proper and not precluded by Evidence Code Section 819.

7.

The defendants are not entitled to any damages by reason of the cross-complaint herein, and the cross-complaint shall be dismissed subject to the plaintiff's acquisition of the defendants' property by a Final Order of Condemnation.

Dated: November 15, 1974

/s/ Gilbert Harelson

Judge of the Superior Court

APPENDIX 3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

COUNTY OF SAN DIEGO,)	
)	
Plaintiff and Appellant,)	
)	4 Civ. No. 15563
v.)	
)	(Sup. Ct. No.
L. E. MORRISON, et al.,)	339813)
)	
Defendants and Respondents.)	
<hr/>		

(Filed February 14, 1977)

APPEAL from a judgment of the Superior Court of San Diego County. Gilbert Harelson, Judge. Reversed.

The County of San Diego sued L. E. Morrison and Jean Morrison in eminent domain to acquire 69.17 acres of river-bottom land located within the flood plain of Sweetwater River. A special use permit had been issued to allow the processing and removal of sand and gravel from approximately six acres of the property. The permit had been issued a number of years before the establishment of a zoning ordinance controlling such activities and the Morrisons were actively engaged in the commercial extraction of sand at the time of trial.

On February 16, 1973, the agreed date of evaluation, the County filed a complaint in eminent domain to acquire the property for park and recreation facilities. After trial

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by court it was found the highest and best use of the property was for extracting sand for a period of ten years, followed by recreational use, and it was found to be reasonably probable the County would issue a permit for such use. The fair market value of the property was fixed at \$837,000 and the value of fixtures set at \$61,630, for a total of \$898,630. The County appeals.

The County contends it was error to admit evidence of net profits derived from a hypothetical business (sand extraction plant) in determining the fair market value of the real property. It is alleged error resulted from the testimony of Dr. Edward J. Neuner, the defense expert, who sought to place a market value on the minerals located on the property based on the income generated by a hypothetical business.¹

Dr. Neuner, whose qualifications as an expert in economics are not in contention, studied the land and its potential uses and reviewed the feasibility study of the sand production capabilities of the property prepared by properly qualified geotechnical and civil engineers and determined the highest and best use was as a source of sand and minerals. He stated he had undertaken a study of production, marketing and pricing of construction quality sand in San Diego County and based his conclusions on this work. He theorized the property could be expected to yield 298,600 tons of sand annually for ten years. He testified he viewed the land and minerals as inseparable items

FOOTNOTE 1: It is not suggested the business conducted by Morrison on the six acres provides the basis for projecting production, sales or expenses of the conduct of business on the acreage subject of this proceeding, so we are not presented the issue of income of an existing business.

App. 15

of value but found the real value in the sand available for extraction and made no effort to fix a value on the surface area after removal of the minerals. In assessing the value of the material in place he drew the following conclusions:

1. *Production.* The property could reasonably be expected to produce approximately 300,000 tons a year for ten years, and a special use permit from the County could be obtained.

2. *Income.* The prudent price for sand from the Morrison property would vary from \$1.80 to \$2.80 per ton depending on its quality and would have a weighted average price of \$2.40 per ton of material commercially marketed. He determined the production from this pit would have no significant impact on the price structure of sand in San Diego County which uses more than 4-1/4 million tons annually and it could be assumed all the sand could be marketed. On this basis the property would produce an annual sales revenue of \$716,640.

3. *Expense.* The direct production costs of extracting, processing and marketing the material would approximate \$1.10 per ton extracted (\$1.10 times 312,400 tons for a total of \$343,640 annual operating costs); \$50,000 would be a reasonable allowance for administrative overhead and cost of managing the extraction; property taxes would run \$17,774 annually.

4. *Capital investment.* \$585,000 was a prudent estimate of the capital expenditures required for a sand producing capacity of 300,000 tons per year. An allowance should be made for a 17 percent capitalization rate of return for the investment in a business with characteristics and risks as here involved.

After determining the value of the minerals the property might reasonably be expected to produce each year, he deducted the cost of extraction including administrative costs, discounted the income at 17 percent for the ten-year period and subtracted the cost of the capital investment to arrive at the present value of the minerals, namely, \$836,926.

The trial court obviously placed great reliance on this method of valuing the property as evidenced by Finding of Fact No. 18.² The finding the property has a fair market value of \$837,000 corresponds to the testimony of Neuner, rounding off his figure to the closest \$100. The finding the residual value of land, subject of the testimony of defendants only other expert, was unconvincing (Finding No. 19),³ and the great disparity of the award with evidence offered by the plaintiff's experts, reveals the court's complete acceptance on Neuner's testimony.

No issue exists between the parties as to the value of fixtures and equipment set by the court.

The United States Constitution (Fifth Amendment), as well as the State Constitution (art. 1, § 14), requires "just compensation for property taken in the exercise of the power of eminent domain." Fair market value is accepted as "just compensation" (*United States v. Commodities Trading Corporation*, 339 U.S. 121 [70 S.Ct. 547];

FOOTNOTE 2: "18. The value of sand in place is fixed by capitalizing the net income from its extraction and sale."

FOOTNOTE 3: "19. The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing."

People ex rel. Dept. of Public Works v. City of Fresno, 210 Cal. App. 2d 500, 515-516). The definition of fair market value has been a matter more for the courts than the Legislature (*County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 145), but the Evidence Code does codify the standards and methods of determining just compensation (Evid. Code § 810 et seq.).⁴ The Code provides, however, those standards are not intended to alter or change existing substantive law (Evid. Code § 812).

The California courts have determined fair market value should be the highest price estimated that the property would bring if it were exposed for sale in the open market for a reasonable period of time, and if the buyer had knowledge of all uses and purposes to which it is adaptable (*Sacramento etc. R.R. Co. v. Heilbron*, 156 Cal. 408, 409). This, of course, justifies the introduction of evidence relative to the availability of this property for various uses. Evidence of the economic feasibility of underwater mining, for example, to show the use to which the property may be put is properly admissible (*People ex rel. Dept. Pub. Wks. v. Flintkote Co.*, 264 Cal. App. 2d 97, 102). The evidence of highest and best use, however,

FOOTNOTE 4: Of particular relevance here is Evidence Code section 819, which provides: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)." (Emphasis added.)

must be distinguished from value from a particular use.⁵ In *Sacramento etc. R.R. Co. v. Heilbron*, *supra*, 156 Cal. 408, 412, the court said:

“[T]he test [of market value] is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is ‘valuable’ for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land. . . .”

This rule has been followed consistently since that time (*City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal. 3d 473, 488-489; *Long Beach City H. S. Dist. v. Stewart*, 30 Cal. 2d 763, 771; *Oakland v. Pacific Coast Lumber etc. Co.*, 171 Cal. 392, 399-400; *Laguna Salada etc. Dist. v. Pac. Dev. Co.*, 119 Cal. App. 2d 470, 476; *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 250-251 (overruled on another point in *County of San Diego v. Miller*, 13 Cal. 3d 684, 693); *City of Stockton v. Vote*, 76 Cal. App. 369, 402-403).

FOOTNOTE 5: The case of *State of Cal. ex rel. State Pub. Wks. Bd. v. Wherity*, 275 Cal. App. 2d 241, relied on by Morrison, draws attention to this distinction (at p. 250), justifying the testimony of the “economist” on “highest and best use when separated from a consideration of the market value of the property itself.” (Emphasis added.)

In *People ex rel. State Park Com. v. Johnson*, 203 Cal. App. 2d 712, defendant's witness, an architect and planning consultant, did a feasibility study of the property with schematic diagrams for the sole purpose of showing that the land could be physically and economically adapted to his envisioned project which was a resort hotel with swimming pool, restaurant and lounge bar. The court first sustained objections to giving any future income figures because of the speculation involved but then asked the witness over plaintiff's objection what a purchaser would pay for property consistent with his plan. The witness then testified as to the figure he felt a buyer would expect to pay and still make "economic ends meet." The reviewing court held while testimony regarding the adaptability of land for that purpose was proper, it was error to admit evidence concerning the specific dollar value of the land for a specific project.

The same result was reached in *People ex rel. Dept. Pub. Wks. v. Silveira*, 236 Cal. App. 2d 604, 627, where the court held it was proper for a jury to consider evidence of economic analysis of adaptability of the property to a commercial and residential development to determine its highest and best use, but held it would be error to admit evidence to support a market value in terms of money which the land would bring for a specific purpose or as a result of a projected specific plan of development.

This rule proscribing evidence of the value of special uses in determining market value has been specifically applied in federal cases involving minerals (*United States v. 13.40 Acres of Land in City of Richmond*, 56 F.Supp. 535, 538, 539). In *County of Los Angeles v. Beverley*, 126

Cal. App.2d 89, 93, testimony of possible oil deposits having a speculative value of \$5,500 was found to be improperly admitted but the case is undoubtedly distinguishable in that the testimony did not actually establish the presence of minerals but assigned the value for the "possibility" of oil being found. The court did, however, restate the general rule we have stated citing *Sacramento etc. R.R. Co. v. Heilbron*, *supra*, 156 Cal. 408.

The rule has been recognized and repeated by leading text writers (4 Nichols on Eminent Domain (3d ed.), § 13.22[2], p. 133; I Orgel, Valuation Under Eminent Domain (2d ed.), § 165, pp. 673-674 [relying in part on *City of Los Angeles v. Deacon*, 119 Cal. App. 491, 494-497]; Palmer's Manual of Condemnation Law, § 86, at p. 242; and is the subject of 156 A.L.R. 1416, at p. 1423 et seq.; 27 Am. Jur. 2d, § 290, at p. 91 et seq.; and 29A C.J.S., § 174, at p. 735 et seq.). We are unable to find authority suggesting a departure from the long line of cases in this area.

While Neuner said the value of the land was inseparable from the minerals located in it, he placed a value on the land based only on the economic analysis of the market value of extracted sand. His value was, strictly speaking, a simple computation of number of tons of material available multiplied by the average price per ton for material of that general quality and subtracting the cost of the extraction which a hypothetical business operating on the premises might expect to incur. Such a business presents highly speculative cost and market determinations. It follows Neuner used an improper method to ascertain projected income and thus to establish a fair market value on the land. Accounting procedures of the business, flood

control programs around the pits, fluctuations in property tax rates or tax assessed value, long-range projection of market demand for the product, inflation of production costs, government's attitude toward growth and its effect on construction programs, etc., present factors not possible to estimate or build into the analysis. Such calculations based on such speculative factors are uniformly rejected by courts and must be rejected here.

Neuner's testimony is properly admissible to attest the highest and best use but it was error to allow admission of dollar value of sales in the course of the hypothetical business to establish fair market value. Morrison's only other expert, a real estate appraiser, admitted reliance on Neuner's analysis in determining the interim value of the property and the court's reliance on Neuner's testimony is apparent from the findings of fact. This testimony of value was clearly prejudicial.

Judgment reversed.

/s/ Cologne
Acting P.J.

WE CONCUR:

/s/ Staniforth
J.

/s/ (Illegible)
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

App. 22

I, ERVIN I. TUSEYNSKL, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 14th day of February A.D. 1977.

ERVIN I. TUSTEYNSKL,
Clerk

By /s/ W. Deeton
Deputy Clerk

App. 23

APPENDIX 4

**COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

L.E. MORRISON,)	
)	
Petitioner,)	4 Civil No. 24342
)	
vs.)	
)	SUPERIOR
SUPERIOR COURT ETC.,)	COURT NO. 339813
COUNTY OF SAN DIEGO,)	
)	
Respondent,)	
)	
COUNTY OF SAN DIEGO,)	
)	
Real Party in Interest.)	

(Filed December 24, 1980)

THE COURT:

The petition for writ of mandate to stay petitioner's displacement from his property pending a determination of available relocation assistance and benefits, is denied.

/s/ Staniforth
Acting Presiding Justice

APPENDIX 5

**COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

COUNTY OF SAN DIEGO,)	
)	
Petitioner,)	4 Civil No. 24948
)	
vs.)	
)	SUPERIOR
SUPERIOR COURT ETC.,)	COURT NO. 339813
COUNTY OF SAN DIEGO,)	
)	
Respondent,)	
)	
E. MORRISON, ET AL,)	
)	
Real Parties in Interest.)	

(Filed July 1, 1981)

THE COURT:

Partially because of the petition's failure to pray for a peremptory writ which this court could expeditiously have issued, and because the petition asks instead for an alternative writ the effect of which will consume much time and cost, we decline to exercise our discretion in correcting the superior court's obvious error in allowing the amendment to include goodwill. We defer our jurisdiction to the appeal, should there be one. The petition for writ of mandate and/or prohibition is denied.

/s/ Brown
Presiding Justice

App. 25

APPENDIX 6

**COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

COUNTY OF SAN DIEGO,)	
)	
Petitioner,)	4 Civil No. 26026
)	
vs.)	
)	SUPERIOR
SUPERIOR COURT ETC.,)	COURT NO. 339813
COUNTY OF SAN DIEGO,)	
)	
Respondent,)	
)	
L. E. MORRISON, ET AL,)	
)	
Real Parties in Interest.)	

(Filed August 19, 1981)

THE COURT:

The petition for writ of mandate and/or prohibition
is denied without prejudice.

/s/ Brown
Presiding Justice

APPENDIX 7

DONALD L. CLARK, County Counsel
County of San Diego

LLOYD M. HARMON, JR., Chief Deputy
JACK LIMBER, Deputy
355 County Administration Center
San Diego, California 92101
(714) 236-3550

Attorneys for Plaintiff

ENTERED

DEC. 16, 1981

Judgment Book 1391 Pg. 231

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,)	
)	No. 339813
Plaintiff,)	
)	JUDGMENT IN
v.)	CONDEMNATION
)	(PARCELS
L. E. MORRISON, et al.,)	71-0083, A, B, C,
)	D & E -
Defendants.)	MORRISON)
<hr/>		

(Filed December 15, 1981)

This eminent domain proceeding brought by the County of San Diego for the condemnation for County regional park purposes of the real property situated in the County of San Diego, State of California, and more particularly described in plaintiff's Complaint on file herein as

Parcels 71-0083 A, B, C, D & E came on regularly for trial on October 5, 1981, in Department 10 of the above-entitled Court, before the Honorable James L. Focht, Judge of the Superior Court, and a jury sworn to try the issue of compensation.

Donald L. Clark, County Counsel and Jack Limber, Deputy County Counsel, appeared as attorneys for plaintiff; Goebel & Monaghan by Louis E. Goebel appeared as attorneys for defendants L. E. Morrison and Jean Morrison. Defendants Bank of America National Trust & Savings Association, Hattie I. Brewer, Vesta Gent, have appeared and answered the complaint herein.

Plaintiff and defendants L. E. Morrison and Jean Morrison entered into a stipulation regarding the compensation to be paid for fixtures and equipment in this action, and pursuant to said stipulation plaintiff deposited with the Clerk of the court the sum of \$69,505.50 as the compensation for the fixtures and equipment, and in accordance with said stipulation and approval by the court defendants L. E. Morrison and Jean Morrison were paid by the Clerk of the court said sum of \$69,505.50 for fixtures and equipment (less \$30,782.82 which was paid by the Clerk to Jennings, Engstrand & Henrikson in satisfaction of a lien on the condemnation proceeds, filed in this action).

Evidence was introduced before the jury on the issue of the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, and on the issue of compensable loss of good will as of February 16, 1973; the cause was argued by counsel and the jury was instructed by the Court; whereupon the jury retired and deliberated and subsequently returned to court and rendered its separate verdicts in the amount of \$875,000.00 as the fair market

value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, which is total compensation for the taking of Parcels 71-0083 A, B, C, D & E; and in the amount of \$56,250.00 as the compensable loss of good will as of February 16, 1973, which is the total compensation for compensable loss of good will.

IT IS HEREBY ORDERED, ADJUDGED AND
DECREED:

1. That plaintiff seeks to take, acquire and condemn the rights, title and interest hereinafter described in and to the real property designated Parcels 71-0083 A, B, C, D & E referred to in Paragraph III of plaintiff's Complaint and described in Exhibit "A" to plaintiff's Complaint to which description reference is hereby made, and by this reference said description is made a part hereof as though fully set forth herein; that the condemnation and taking thereof is for the public purposes set forth in the Complaint herein, and is necessary to such public uses.

2. That upon payment into Court of the total sum of \$875,000.00 for the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973 (less the sums of \$20,000.00 and \$499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and the sum of \$56,250.00 for compensable loss of good will as of February 16, 1973, together with interest at the rate of seven percent (7%) per annum on the following sums and for the dates specified below:

(a) \$356,000.00 (\$875,000.00 less \$519,000.00) from August 13, 1980 (date County took possession of property) to the date of deposit of said sum into Court,

(b) \$56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sum in Court,

there shall be condemned to the plaintiff the hereinafter described interests in said real property designated Parcels 71-0083 A, B, C, D & E; said sum shall be in full payment for the condemnation and taking of said real property. Said sum shall include compensation on account of plaintiff's possession of said real property prior to the entry of this judgment.

3. That said payment as hereinabove specified shall terminate, cancel and extinguish all liens, leaseholds and encumbrances of whatsoever nature on said real property. Said sums shall be paid to defendants as follows:

For Parcels 71-0083 A, B, C, D & E the sums of \$875,000.00 (less the sums of \$20,000.00 and \$499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and \$56,250.00 for compensable loss of good will, together with interest as herein described as follows:

(a) To the COUNTY OF SAN DIEGO for taxes the sum of \$2,246.58.

(b) To defendants L. E. MORRISON AND JEAN MORRISON and defendants BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, HATTIE I. BREWER, VESTAGENT, as their interests may appear, the sum of \$872,753.42, less the sums of \$20,000.00 and \$499,000.00 previously withdrawn, together with interest as herein specified on the sums and for the dates specified below:

\$356,000.00 (\$875,000.00 less \$519,000.00) from August 13, 1980 (date County took possession of property) to the date of deposit of said sum into Court.

(c) To defendants L. E. Morrison and Jean Morrison the sum of \$56,250.00, together with in-

terest as herein specified on the sums and for the dates specified below:

\$56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sum in Court.

4. That the sum of \$519,000.00 heretofore deposited into Court by plaintiff as a security deposit for the taking of Parcels 71-0083 A, B, C, D & E shall be deemed to have been deposited in partial satisfaction of this award.

5. Upon payment of said sum into Court as hereinabove specified there shall be entered in favor of plaintiff a Final Order of Condemnation for said parcel of real property.

6. That plaintiff seeks to take, acquire and condemn the fee simple title to Parcels 71-0083 A, B, C, D & E hereinabove referred to and described by reference to plaintiff's Complaint and therein designated by the same parcel number.

DATED: DEC. 15, 1981

/s/ James L. Focht
Judge of the Superior Court

APPROVED AS TO FORM:

/s/ Donald L. Clark
DONALD L. CLARK, County Counsel
Attorney for Plaintiff
GOEBEL & MONAGHAN

/s/ Louis E. Goebel
LOUIS E. GOEBEL
Attorneys for Defendants

APPENDIX 8

CERTIFIED FOR PARTIAL PUBLICATION¹

**COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA**

COUNTY OF SAN DIEGO,)	
)	
Plaintiff and Appellant,)	4 Civ. No. 26710
)	
v.)	(Super Ct. No.
)	339813
L. E. MORRISON, ET AL.,)	
)	(Filed March 19,
Defendants and Cross-)	1984)
Appellants.)	
)	
)	

APPEAL from a judgment of the Superior Court of San Diego County, James L. Focht, Judge. Affirmed in part as modified; reversed in part and remanded.

Joseph Kase, Jr., County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel and Sandra J. Brower, Deputy County Counsel, for Plaintiff and Appellant.

Goebel & Monaghan, Louis E. Goebel and James E. Rubnitz for Defendants and Cross-Appellants.

This appeal arises from a long-standing eminent domain proceeding initiated by the County of San Diego (County) in 1973 to acquire 69.17 acres from L. E. and

¹Certified for publication with the exception of sections II through IV.

Jean Morrison (Morrison) for the development of Sweet-water Regional Park.

The case first went to trial in 1974 to resolve the principal issue of the property's fair market value. The County appealed the judgment rendered in that trial on grounds not at issue here and this court reversed. The judgment entered in December 1981 after retrial included \$56,250 as compensation for loss of business goodwill. The County appeals this portion of the judgment, contending the applicable law does not provide compensation for loss of business goodwill.

The Morrisons' cross-appeal focuses on three areas. The judgment was based on the fair market value of the property on February 16, 1973, the date the original complaint and summons were filed. The judgment also included an award of interest at the legal rate of seven percent per annum on two figures: \$356,000 (the difference between the amount the County had deposited as probable compensation (\$519,000) and the amount found by the jury to be the fair market value (\$875,000)) and \$56,250 (the loss of business goodwill). The Morrisons challenge the selected valuation date, arguing it should be May 9, 1980, the date the County deposited probable compensation, rather than February 16, 1973. They also challenge the award of seven percent interest, contending the rate is too low to justly compensate them and should be based on the prevailing market rate of interest. Finally, the Morrisons appeal the court's denial of their motion to recover litigation expenses.

Because we decide the law governing this action does not provide compensation for loss of business goodwill, we modify the judgment to exclude that award and accom-

panying interest. We also hold the court properly selected February 16, 1973 as the valuation date and correctly denied the Morrisons' motion to recover litigation expenses. As to those issues, we affirm the judgment as modified. However, in light of *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, we reverse the award of seven percent interest on the \$356,000 unpaid value of the Morrison's property and remand the matter for a determination of the applicable market rate of interest.

Factual and Procedural Background

Many of the problems in this case result from the long span of years separating the date of complaint from the judgment entered after retrial. During this time period, property values appreciated, interest rates reached record highs and the Legislature enacted a new body of law to govern eminent domain proceedings.

When the County began proceedings on February 16, 1973, eminent domain law in California was controlled by former title 7 of part 3 of the Code of Civil Procedure,² consisting of sections 1237 and 1267. This entire law was repealed and reenacted in 1975 (stats. 1975, c. 1275, §§ 1, 2, p. 3409, operative July 1, 1976) with the revised statute, entitled "Eminent Domain Law," included in new title 7 of part 3. (§ 1230.010 et seq.)

The new law became operative while this case was on appeal following the first trial. However, the former law properly governed appellate review in light of section 1230.065 which provides:

²All statutory references are to the Code of Civil Procedure unless otherwise indicated.

“(a) This title becomes operative July 1, 1976.

“(b) *This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976.* Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.

“(c) Chapter 3 (commencing with Section 1240.010), Chapter 4 (commencing with Section 1245.010), and Chapter 5 (commencing with Section 1250.010) do not apply to a proceeding commenced prior to the operative date.

“(d) *If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion.* (Italics added.)

Following reversal, the case was set for retrial. Although originally scheduled for July 1978, several continuances granted at the Morrisons' request delayed the trial date by more than three years. Pending retrial, the Morrisons successfully moved for leave to supplement their answer by adding a request for compensation for loss of business goodwill. The motion was based on the new eminent domain law, section 1263.510 which, unlike the old law, provides for compensation for loss of business goodwill. The County opposed the motion on the basis the new law did not apply to this case, citing section 1230.065.

Although the County attempted to defeat the amendment through several writ and motion proceedings, the case went to trial with the issue of goodwill compensation

placed before the jury. Comments made by this court in denying the County's first writ petition and by the trial court at a motion hearing indicated the first court's earlier granting of leave to supplement the answer was in error, but that the error could be corrected only on appeal. In order to prevent the need for a retrial on this issue, the trial court specifically submitted a special verdict regarding goodwill compensation.

At retrial the jury found the fair market value of the property on February 16, 1973 was \$875,000 and the compensable loss of business goodwill was \$56,250. The judgment in condemnation entered by the court included an award of seven percent interest per annum running from August 13, 1980, the date the County took possession of the property. The record does not reveal what steps, if any, the Morrisons took either before or after judgment to challenge the award of seven percent interest.

After trial, the Morrisons moved to recover litigation expenses under the federal and state constitutions and under former section 1249.3 and present section 1250.410. The court denied the motion, finding the Morrisons did not timely file and serve the County with a final demand as required as a condition to recovery under the code.

Discussion

I

Payment for loss of business goodwill resulting from condemnation is not constitutionally required. (*Community Redevelopment Agency v. Abrams* (1975) 15 Cal.3d 813,

831-832, cert. den., 429 U.S. 869).³ The Legislature, in enacting the new eminent domain law (§ 1230.010 et seq.), made such compensation available for the first time. (See § 1263.510.) Because the new law did not become operative until July 1, 1976, compensation for loss of business goodwill was not available to the Morrisons at their first trial.

The County, pointing to section 1230.065 (see *ante*), contends such compensation also was not available at the second trial. It explains that since the proceeding began on the date the complaint was filed, February 16, 1973, subdivision (b) controls and prohibits application of the new law in stating: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976." The Morrisons argue that we cannot rely solely on the statute but must also consider the legislative comments to section 1230.065. If we do so they believe we will conclude their second trial was governed by the new law. Although we accommodate the Morrisons' request to consider the legislative history, we nonetheless hold the statutory language is clear in prohibiting application of the new law to this case.⁴

³"The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, [citation], provides in relevant part: ' . . . nor shall private property be taken for public use, without just compensation.' [¶] Article I, section 19 (replacing former art. I, § 14) of the California Constitution provides in relevant part: 'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.' " (*Id.*, at p. 816, fn. 2.)

⁴The Morrisons also present an "operative facts" argument, i.e., the new law should apply here because they lost their

The language of section 1230.065 is clear and unambiguous on its face. The general principle in cases where there is no need for construction is to refrain from indulging in it. (*People v. Belleci* (1979) 24 Cal.3d 879, 884; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) While the Morrisons apparently agree the new law is inapplicable to a proceeding started before January 1, 1976 which reaches a *first trial* after that date, they argue a case scheduled for *retrial* after January 1, 1976 following appeal is governed by the new law. They rely on the legislative committee comment to section 1230.065 which discusses subdivision (d) and provides if a posttrial motion or appeal results in a new trial, "this title would govern the further proceedings in the action under subdivision (b)."⁵ Referring back to subdivision (b), however, we are

(Continued from previous page)

business when the County took possession in August 1980, four years after the new law's operative date. Neither the statute nor the comments, however, refer to "operative facts" or attach any significance to when such facts occur. The controlling event for application of the new law is the commencement of the eminent domain proceeding (see § 1230.065, subs. (b) and (c)), not the occurrence of any particular operative fact.

⁵The Legislative Committee comment to section 1230.065 provides:

"Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1976, to allow sufficient time for interested persons to become familiar with the new law.

"Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial are [*sic*] awaiting imminent trial, the immediate application of this title would not delay the parties or court in

(Continued on following page)

confronted with the first sentence: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976."

These two statements appear contradictory and are best explained by the fact that amendments made to section 1230.065 while it was being considered by the Legislature were not fully dealt with by the comments. The new eminent domain law was designed to be retroactive, but during the legislative process an amendment made it non-retroactive. Some of the comments addressing retroactivity were altered to reflect this change, but the comments regarding retrial remained untouched, possibly due to oversight.

(Continued from previous page)

proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase 'to the fullest extent practicable' is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

"Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

"Subdivision (d) provides, in the interest of fairness, than any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable where [*sic*] the action was tried. It would be unfair to hold litigants to a differnt rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. *If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).*" (Italics added.)

Section 1230.065 was introduced on December 2, 1974, as AB 11 by Assemblyman McAlister. As introduced, the eminent domain law was intended to apply to proceedings already commenced:

“(b) Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding commenced prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.” (§ 1230.065, subd. (b) of AB 11 as introduced Dec. 2, 1974.)

Subdivision (d) and the committee comments to that subdivision were the same in 1974 as they are now.⁶ In the context of the statute as introduced, the comment correctly and logically explained the new law would govern a new trial after the operative date even if the case had commenced prior to that date. This paralleled treatment of cases coming to *first* trial after the operative date, which also were governed by the new law. (See subd. (b) of AB 11 as introduced, *ante*.)

On April 10, 1975, AB 11 was amended to prohibit retroactive application. At the time of this amendment, the comment to subdivision (b) also was amended to reflect the altered intent. (Compare fns. 5 and 6, *ante*.) How-

⁶The original committee comment to section 1230.065, subdivision (b) differed from the final comment. The original comment provided in part:

“Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings. In most proceedings, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. . . .”

ever, the comment to subdivision (d) was not amended, even though it had been drafted when the statute was to be applied retroactively.

The law we are left with expressly precludes retroactive application and yet, through the comment to subdivision (d), seems to suggest a legislative intent to apply the new eminent domain law to cases on retrial. The best explanation for this contradictory comment is oversight. Explicit steps were taken to amend subdivision (b) to eliminate retroactivity and the comments to subdivision (b) were accordingly modified. Subdivision (d) was not amended, and perhaps it did not occur to the legislators to review the comments relating to that subdivision. If the Legislature had intended the new law to apply to cases at retrial, it would have amended the statute to reflect that intent. Since it did not, we are left with an unambiguous statute and ambiguous legislative history and will therefore rely on the statute to deny application of the new law to the Morrisons. Our conclusion comports with the general rule that resort to legislative history is unnecessary when statutory language is certain and unambiguous. (*People v. Flores* (1979) 92 Cal.App.3d 461, 472.) “[W]e are not free to substitute legislative history for the language of the statute.” (*Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584, 588, fn. 7, cert. den., 103 S.Ct. 1183.)

This result is unfair to the extent the Morrisons are denied compensation for a loss for which others will receive compensation. However, it is within the Legislature’s power in the field of economic regulation to select a date certain from which new benefits will be bestowed. Such

a chronological classification provides for orderly transition and bears a rational relationship to an appropriate governmental objective. (*Carson Redevelopment Agency v. Wolf* (1979) 99 Cal.App.3d 239, 243-245.)

II

On cross-appeal, the Morrisons challenge the valuation date of February 16, 1973 which was used both at trial and at retrial. Relying on new section 1263.110, the Morrisons propose the date the County deposited probable compensation, May 9, 1980, as the correct date. Because we have already decided the new law does not apply to this case, the valuation date must be determined by the prior law, which provided:

“For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons . . . provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. . . .” (Former § 1249, repealed by stats. 1975 c. 1275, § 1, p. 3409.)

The summons in this case was filed by the County on February 16, 1973 and that date was used as the valuation date at the first trial even though that trial began more than one year after the issuance of summons. The record does not reveal who or what caused the delay, but the parties apparently agreed on February 16, 1973 as the correct date. The Morrisons later agreed in a stipulation filed with the court to retain February 16, 1973 as the

valuation date for purposes of retrial. Once that valuation date was determined at the first trial it became the applicable date for all further proceedings, including retrial. (*People v. Murata* (1960) 55 Cal.2d 1, 10.) This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*.

III

Relying on *Redevelopment Agency v. Gillmore, supra*, 150 Cal.App.3d at pp. 1095-1096, the Morrisons argue they are entitled under the Fifth and Fourteenth Amendments to the United States Constitution to interest on the \$356,000 unpaid value of their property at the prevailing market rate rather than the legal rate. The County points out the Morrisons did not challenge the award of seven percent interest in the trial court, and argues that omission precludes them from raising the interest rate issue for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.App. 3d 388, 394.)

As a general rule, trial lawyers must make a record to preserve an issue for appeal. Like all rules, however, this general statement must be qualified where there is a sharp break in the law and the lawyer should not reasonably be charged with anticipating that change (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal. App.3d 362, 372) or where, as a practical matter, making the record would be an exercise in futility. (Civ. Code, § 3532; *Sea & Sage Audubon Society, Inc. v. Planning Com.* 1983) 34 Cal.3d 412, 418, mod. 34 Cal.3d 732b.)

Lawyers are not required to test judicial temperament by futilely attempting to make useless objections. Although *Gilmore's* market rate interest holding was foreshadowed before retrial here by two Ninth Circuit cases (*United States v. 429.59 Acres of Land* (9th Cir. 1980) 612 F.2d 459, 464-465; *United States v. Blankinship* (9th Cir. 1976) 543 F.2d 1272, 1274-1277), the Morrisons faced the same trial judge below who rejected the condemnee's request for market rate interest in *L & M Professional Consultants, Inc. v. Ferreira* (1983) 146 Cal.App.3d 1038. In light of that previous contrary ruling on the merits, it would have been an exercise in futility for the Morrisons to have challenged the court's award of seven percent interest in this case. (See Civ. Code, § 3532; compare *Sea & Sage Audubon Society, Inc. v. Planning Com.*, *supra*, 34 Cal.3d at pp. 418-419.) Because we are persuaded by the holding and rationale in *Gilmore*, we remand for a determination of the applicable market rate of interest. (See *Redevelopment Agency v. Gilmore*, *supra*, 150 Cal.App.3d at pp. 1100-1101.)

IV

The payment of litigation expenses is not constitutionally required. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 658; *County of Los Angeles v. Ortiz* (1971) 6 Cal.3d 141, 148.) However, the Legislature provided a method of recovery via former section 1249.3:

"At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and defendant shall in like manner, file and serve a copy thereof on plaintiff his final demand

for the property sought to be condemned. Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

“If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney’s fees, appraisal fees, surveyor’s fees, and the fees for other experts,

“In determining the amount of attorneys [sic] fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial.” (Former § 1249.3, repealed by stats. 1975, c. 1275, § 1, p. 3409.)

The Morrisons never filed or served a final demand on the County. The purpose of former section 1249.3 was “to encourage early settlement so trial can be avoided. Since one of the bargaining parties is a person representing a governmental agency, who cannot make a binding agreement without the agency’s approval, a 30-day minimum time period is necessary to complete a settlement. *To achieve the statute’s goal, the 30-day minimum time period must be mandatory.* [¶] . . . As a means of encouraging negotiations before trial, the Legislature put incentives into the statute. *The condemnee who makes a timely final demand and goes to trial only when the offer is unreasonable has the potential of being reimbursed for expenses which he could not otherwise recover; likewise, the con-*

demnor who makes a timely reasonable offer, whether it is accepted by the condemnee or not, may avoid having to pay the condemnee's extraordinary costs. *The property owner, by not filing a final demand when he thinks the condemnor's offer is unreasonable, forfeits the possibility of recovering costs*; the condemnor, by not filing a final offer, may be liable for the property owner's extraordinary costs where the owner has made a final demand." (*People ex rel. Dept. of Transportation v. Callahan Brothers* (1977) 69 Cal.App.3d 541, 543-544, italics added; accord, *City of San Leandro v. Highsmith* (1981) 123 Cal.App.3d 146, 153-155;⁷ *Lake County Sanitation Dist. v. Schultz* (1978) 85 Cal.App.3d 658, 668-669; see also *People ex rel. Dept. of Transportation v. Patton Mission Properties* (1979) 89 Cal.App.3d 204, 212-213; but see *People ex rel. Dept. of Transportation v. Societa Di Unione E Beneficenza Italiana* (1978) 87 Cal.App.3d 14, 20-22.)

The Morrisons attempt to salvage their claim to litigation expenses by arguing they made an informal final demand which substantially complied with the notice requirements of former section 1249.3. They argue their decision not to cross-appeal the judgment entered after the *first trial* constituted a substitute final demand before *retrial* for the amount of the original judgment. Such informal

⁷*Highsmith* considered the effect of an untimely final demand under section 1250.410, the successor to former 1249.3. This distinction, however, is largely meaningless because section 1250.410 continues the substance of former section 1249.3. (*People ex rel. Dept. of Transportation v. Sunshine Canyon, Inc.* (1979) 94 Cal.App.3d 599, 601, fn. 1.) In *State of California ex rel. State Pub. Works Bd. v. Turner* (1979) 90 Cal.App.3d 33 this court examined only the reasonableness of the condemnor's final offer and did not consider the issue of the timeliness of the condemnee's final demand. (*Id.*, at p. 36, fn. 2.)

methods, however, do not meet the statutory requirements. As the court explained in *City of San Leandro v. Highsmith*, supra, 123 Cal.App.3d at p. 155, "a recital of the demand and offer in a settlement conference statement, or in any other document, is not an adequate substitute for the formal demand and offer contemplated by section 1250.410[*] unless the parties have stipulated to a less formal exchange. The Legislature did not direct the parties to 'apprise' each other or 'communicate' with each other about an offer or demand. It mandated that a 'final offer of compensation' and a 'final demand for compensation' shall be served on the opposing party and filed with the court in the manner prescribed for service of a notice of motion." Accordingly, the court below correctly denied the Morrisons' motion to recover litigation expenses.

Disposition

The judgment is modified by striking the award of \$56,250 as compensation for loss of business goodwill plus interest awarded on that sum. As modified, the judgment is affirmed except as to the award of seven percent interest on the \$356,000 unpaid value of the Morrisons' property. That award is reversed and the case is remanded for further proceedings to determine the applicable market rate of interest.

*See fn. 7, ante.

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CERTIFIED FOR PARTIAL PUBLICATION.

/s/ Wiener
WIENER, Acting P.J.

WE CONCUR:

/s/ Work
WORK, J.

/s/ Butler
BUTLER, J.

APPENDIX 9

CERTIFIED FOR PARTIAL PUBLICATION
COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO,)	ORDER
)	MODIFYING
Plaintiff and Appellant,)	OPINION
)	
v.)	4 Civ. No. 26710
)	
L. E. MORRISON, ET AL.,)	(Super. Ct.
)	No. 339813)
Defendants and Cross-)	
Appellants.)	(Filed
)	April 17, 1984)

THE COURT:

The opinion filed on March 19, 1984 is modified as follows:

1. On page 3, the last sentence in the first full paragraph is modified to read:

“However, we reverse the award of seven percent interest on the \$356,000 unpaid value of the Morrisons’ property and remand the matter for a determination of the applicable market rate of interest.”

2. On page 13, the first partial sentence under part III is modified to read:

“Relying on *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, the Morrisons argue they are”

cc:All parties

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APPENDIX 10

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JUN 21 1984

I have this day filed Order _____

HEARING DENIED

In re: 4 Civ. No. 26710

COUNTY OF SAN DIEGO

vs.

L. E. MORRISON, et al.

Respectfully,
Clerk

APPENDIX 11

NOTE: THIS DOCUMENT IS SUBMITTED IN LIEU OF THIS COURT'S ORDER DENYING CERTIORARI WHICH WAS ISSUED NOVEMBER 26, 1984 AS SAID ORDER IS UNAVAILABLE.

No. 84-454

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

L. E. MORRISON and JEAN MORRISON,
Petitioners,

vs.

COUNTY OF SAN DIEGO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

GOEBEL & MONAGHAN
By: LOUIS E. GOEBEL
401 West A Street
San Diego, California 92101
Telephone: (619) 231-0059

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Does a property owner whose property is taken under the power of eminent domain receive the just compensation which the Constitution guarantees when he receives substantially less than the fair market value of his property on the date payment is tendered by the condemning agency?

2. Does a seven year delay between the date of valuation of condemned property and the date of payment by the condemning agency violate the guarantees of the Fifth Amendment of just compensation on the taking of private property for public use?

3. Does the Fifth Amendment and this Court's recent decision in *Kirby Forest Industries, Inc. v. United States*, compel a modification to the condemnation award herein where there is a seven year delay between the date of valuation and the date of payment, during which time the value of the land changed dramatically?

4. Is the attempt to pay a condemnation award only in 1980, when the award is based on 1973 values, and when the property has increased dramatically in value during the period, such a clear violation of the Fifth Amendment as to require this Court's intervention to assure just compensation to the property owner?

APPENDIX 12

**IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO**

COUNTY OF SAN DIEGO,)	
)	
Plaintiff,)	No. 339813
)	
v.)	ORDER DENY-
)	ING MOTION
L. E. MORRISON, et al.,)	FOR RELIEF
)	FROM
Defendants.)	JUDGMENT
)	
)	(Filed September
)	20, 1985)
L. E. MORRISON and JEAN)	
MORRISON,)	
)	
Cross-Complainants,)	
)	
v.)	
)	
COUNTY OF SAN DIEGO, et al.,)	
)	
Cross-Defendants.)	
)	
)	

The motion of defendants and cross-complainants for relief from judgment in the above entitled matter came on regularly for hearing September 9, 1985, in Department 35 of the above entitled Court, the Honorable Arthur W. Jones, Judge Presiding. Louis E. Goebel appeared as counsel for defendants and cross-complainants, and Lloyd M. Harmon, Jr., County Counsel by Sandra J. Brower,

Deputy County Counsel, appeared as counsel for plaintiff and cross-defendants. The Court having considered the pleadings on file herein and having heard argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant and cross-complainants' motion herein for relief from judgment is denied without prejudice to bring a different type of motion.

DATED: SEP 20 1985

ARTHUR W. JONES
JUDGE OF THE
SUPERIOR COURT

Approved as to Form:

LLOYD M. HARMON, JR., County Counsel

/s/ By Sandra J. Brower
SANDRA J. BROWER
Deputy County Counsel

GOEBEL, SHENSA & BEALE

/s/ By L. E. Goebel
LOUIS E. GOEBEL, Esq.

APPENDIX 13

**IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN DIEGO**

COUNTY OF SAN DIEGO,)	No. 339813
)	
Plaintiff,)	ORDER
)	DENYING
v.)	MOTION FOR
)	RELIEF FROM
L. E. MORRISON, et al.,)	JUDGMENT
)	
Defendants.)	(Filed January
)	7, 1986)
<hr/> L. E. MORRISON and)	
JEAN MORRISON,)	
Cross-Complainants,)	
v.)	
)	
COUNTY OF SAN DIEGO, et al.,)	
)	
Cross-Defendants.)	
<hr/>)	

The motion of defendants and cross-complainants for relief from judgment in the above entitled matter came on regularly for hearing December 20, 1985, in Department 35 of the above-entitled Court, the Honorable Mack P. Lovett, Judge Presiding. Louis E. Goebel appeared as counsel for defendants and cross-complainants, and Lloyd M. Harmon, Jr., County Counsel by Sandra J. Brower, Deputy County Counsel, appeared as counsel for plaintiff and cross-defendants. The Court having considered the pleadings on file herein and having heard argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant and cross-complainants' motion herein for relief from judgment is denied without prejudice to bring again before the trial judge.

DATED: Jan. 7, 1986.

/s/ Donald W. Smith
JUDGE OF THE
SUPERIOR COURT

SIGNED BY THE PRESIDING JUDGE PURSUANT
TO SECTION 635 C.C.P.

APPROVED AS TO FORM:

LLOYD M. HARMON, JR., County Counsel

/s/ Bruce W. Beach for
SANDRA J. BROWER, Deputy County
Counsel
Attorney for Plaintiff

/s/ L. E. Goebel
LOUIS E. GOEBEL, Esq.
Attorney for Defendant

The foregoing instrument is a full, true and correct copy
of the original on file in this office.

Attest Jan. 8, 1987

ROBERT D. ZUMWALT
County Clerk and Clerk of the Superior Court of the
State of California, in and for the County of San Diego.

/s/ Lucia P. Ramirez, Deputy
LUCIA P. RAMIREZ

APPENDIX 14

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO**

COUNTY OF SAN DIEGO,)	No. 339813
)	
Plaintiff,)	ORDER
)	DENYING
v.)	MOTION IN
)	LIMINE
L. E. MORRISON, et al.,)	
)	(Filed March
Defendants.)	28, 1986)
<hr/>		
L. E. MORRISON and)	
JEAN MORRISON,)	
)	
Cross-Complainants,)	
)	
v.)	
)	
COUNTY OF SAN DIEGO, et al.,)	
)	
Cross-Defendants.)	
<hr/>		

Defendant and cross-complainants Morrisons' Motion in Limine to admit evidence on change of value of property came on regularly for hearing on February 7, 1986 in Department 22 of the above-entitled court before the Honorable Thomas G. Duffy, Judge presiding. Louis E. Goebel, Esq., appeared as counsel for defendants and cross-complainant and Lloyd M. Harmon, Jr., County Counsel, by Arlene Prater, Deputy County Counsel, appeared as counsel for plaintiff and cross-defendants. The court having considered the pleadings on file herein and

good cause appearing therefor in that the motion and relief sought are beyond the jurisdiction of the court.

IT IS HEREBY ORDERED that defendants and cross-complainants Morrisons' Motion in Limine to admit evidence on change of value in property herein is denied.

DATED: Mar. 28, 1986.

/s/ Thomas G. Duffy

Judge of the Superior Court

APPENDIX 15

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO,)	No. 339813
)	
Plaintiff,)	SUPPLEMENTAL
)	JUDGMENT
v.)	ON REMAND
)	
L. E. MORRISON, et al.,)	(Filed June
)	11, 1986)
Defendants.)	
<hr/>		
L. E. MORRISON and)	
JEAN MORRISON,)	
)	
Cross-Complainants,)	
)	
v.)	
)	
COUNTY OF SAN DIEGO, et al.,)	
)	
Cross-Defendants.)	
<hr/>		

This matter was remanded to this Court by the Fourth District Court of Appeal for further proceedings to determine the applicable market rate of interest.

A hearing was held on February 7, 1986, in Department 22 of the above-entitled Court, the Honorable Thomas G. Duffy, Judge Presiding, to determine the applicable market rate of interest. Louis E. Goebel appeared as counsel for defendants and cross-complainants L. E. MORRISON and JEAN MORRISON, and Lloyd M. Harmon,

Jr., County Counsel, by Arlene Prater, Deputy County Counsel, appeared as counsel for plaintiff and cross-defendant COUNTY OF SAN DIEGO.

Defendants and cross-complainants brought a motion in limine to admit evidence on the change of value of the property.

The Court having considered the pleadings on file herein, and oral argument, and the Stipulation Re Rate of Interest attached hereto as Exhibit "A" and incorporated herein by this reference.

IT IS ORDERED, ADJUDGED AND DECREED:

1. The motion in limine brought by defendants and cross-complainants to admit evidence on change of value of the property is denied.

2. The parties hereto have agreed for purposes of this judgment only that the applicable market rate of interest for the time period August 13, 1980 through February 14, 1982, was $14\frac{1}{2}$ percent.

3. Interest at $14\frac{1}{2}$ percent for the time period August 13, 1980 through February 14, 1982 on \$356,000 equals \$77,784.00.

4. The County of San Diego has already paid interest on that sum for that period at the amount of seven percent for a total of \$37,550.00. The County of San Diego owed to the Morrisons as interest the total sum of \$40,234.00.

5. The County of San Diego paid to the Morrisons \$56,250.00 for loss of business good will plus interest on that amount of \$5,933.00 for a total of \$62,183.00.

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6. Pursuant to the decision of the Court of Appeal and the Stipulation attached hereto, the Morrisons owe the County of San Diego the sum of \$21,949.00.

Dated: Jun 11, 1986.

/s/Thomas G. Duffy
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: 5-20-86

GOEBEL, SHENSA & BEALE
By: /s/L. E. Goebel
Louis E. Goebel
Attorneys for Defendants
and Cross-Complainants
L. E. MORRISON and
JEAN MORRISON

Dated: 6-4-86

LLOYD M. HARMON, JR.,
County Counsel
DANIEL J. WALLACE,
Chief Deputy
By: /s/ Arlene Prater
ARLENE PRATER, Deputy
County Counsel
Attorneys for Plaintiff and
Cross-Defendant COUNTY OF
SAN DIEGO
